Adoption and looked after children
A comparison of legal initiatives in the UK and the USA

Sarah Sargent compares and contrasts the initiatives in the USA and the UK.

Introduction
The landscape of adoption law has undergone significant changes during the past several years in the United States and in the United Kingdom. Both countries have identified concerns that children spend too much time in out-of-home placements that are not permanent and stable. Far too few of these children find permanent and stable families of their own. Adoption has been a little utilised option for them, with the consequence that many end up in multiple placements, and finally become old enough to exit the child welfare system, but without having experienced a permanent, secure and nurturing home during their childhood years.

Each country took far-reaching steps to design responses to the problem. In response to a call for action from the US President in 1996, the US Department of Health and Human Services undertook an extensive consultation with adoption and foster care professionals, child welfare and adoption-related organisations to develop a blueprint for reform legislation. In the UK the Performance and Innovation Unit carried out a study in 2000 at the request of the Prime Minister. The study was a review of adoption of looked after children and was based on research and discussions with local authorities, voluntary organisations and interested groups.

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The USA and UK proportionately have a much higher percentage of children under 18 in care, as compared to other countries. However, the USA has a higher proportion of children in care than even the UK, with 74 children per 10,000 ‘looked after’ in the USA compared to 47 per 10,000 in England (Performance and Innovation Unit, 2000).

While there are differences between the laws and the child welfare systems of the two countries, there are many striking parallels and similarities. An international comparison reveals just how closely matched the UK and the USA are as compared to other countries. According to the Performance and Innovation Unit Report (2000):

The UK is closer to the USA in the extent to which it is willing to over-rule parental wishes in order to place children for adoption. Elsewhere in Europe, there is a much greater reluctance to over-rule the wishes of parents. (Annex 4)

In Sweden, Finland and Denmark adoption is not currently viewed as an option in child welfare policy. Welfare policy in these countries concentrates on strengthening families and on preventive services. The rate of children entering care is very low. In Sweden, there is no provision for placing a child for adoption without the consent of the parents (Performance and Innovation Unit, 2000).

Australia and New Zealand both promote working together with families, with an emphasis on early prevention rather than intervention. Forms of guardianship are available when parental consent is not given for adoption. Special provisions ensure that whenever possible, children of indigenous ethnic origin remain within their kinship groups (Performance and Innovation Unit, 2000).

Thus, out of these Western countries, it is the UK and the USA which have the highest percentage of children in care,
and which have focused on adoption as a permanency solution for children, even when consent of the parent to such an arrangement is lacking.

Overview of initiatives in the USA

Adoption 2002

On 19 November 1997, President Clinton signed the Adoption and Safe Families Act (ASFA) into law, putting into place the most extensive changes in national adoption law and policy since the enactment of the Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272).

ASFA was the culmination of a concerted effort to create a new roadmap for looked after children, focusing on adoption as a viable alternative of permanent placement for children in care. Until then, children tended to languish for long periods of time in foster care and experienced multiple moves. There was a lack of clarity as to what should take precedence in making decisions about reuniting children with their families (US Department of Health and Human Services, 1997). It was unclear whether it was more important to reunify families or to give more weight to the safety and well-being of the child, even if that would lead to extended stays in foster care.

ASFA amends the Adoption Assistance and Child Welfare Act (AACWA) of 1980, which established the framework for child welfare practice in the USA. This earlier Act introduced concepts of ‘permanency’ and ‘reasonable efforts’ into both law and practice, but with an emphasis much different from that of ASFA. Under AACWA, reasonable efforts and permanency focused on the reunification of the child with their family and on efforts to prevent the removal of the child from their home (Public Law 96-272, §471(a) (15)).

AACWA created a hierarchy of permanency options, which again in practice focused on reunification efforts of the child with their family (Public Law 96-272, §475(5)(B)), almost to the exclusion of considering other options (US Department of Health and Human Services, 1997).

The Executive Summary of the Adoption 2002 report noted the lack of focus on the permanency needs for children, citing ‘well-intended but misguided practices to preserve families through prolonged and extensive reunification services without adequate consideration of the permanency needs of children’ (US Department of Health and Human Services, 1997).

The White House began the initiative to change the adoption law with the release of an Executive Memorandum on 14 December 1996. The title of the memorandum was ‘Steps to increase adoptions and alternate permanent placement for waiting children in the public child welfare system’ (President Clinton, 1996).

The memorandum directed the Secretary of the US Department of Health and Human Services to outline a plan to move increased numbers of children more rapidly from foster care to permanent homes, and to recommend changes to national law and regulations that would emphasise the importance of planning for permanency as soon as a child enters the foster care system.

Adoption 2002, issued in response to the Executive Memorandum, was designed to be a blueprint for adoption and other permanency planning for looked after children. The report takes its name from one of the central goals of the presidential memorandum which was to double, by the year 2002, the number of children adopted or placed in other permanent homes each year. The report outlines barriers to expediting the placement of children from foster care in permanent homes, an agenda to help overcome these barriers and to accelerate the path to permanency for children, and ways in which the federal government can assume leadership in breaking down barriers to permanency for looked after children. In preparation of the report, the Department of Health and Human Services consulted with child welfare professionals, policy experts, foster parents and adoptive parents at the national, state and local level (US Department of Health and Human Services, 1997). Young people were not included as part of the consultation process.

Many of the report’s components were incorporated into the Adoptions and Safe
Families Act, which was signed into law in November 1997 as Public Law 105-89.

**Adoption and Safe Families Act of 1997**

Key provisions of ASFA include:

- alteration of the reasonable efforts that state agencies must make to preserve or reunite families;
- a hierarchy of permanency options to be considered in ‘permanency hearings’ held every 12 months;
- deadlines for the initiation of termination of parental rights proceedings;
- ‘legal guardianship’ as a new permanency option;
- a system of financial bonuses to states with increased adoptions.

*Reasonable efforts* under ASFA

ASFA clarifies whether and when reasonable efforts must be made to preserve or reunite families, but does not specify what constitutes ‘reasonable efforts’. It is up to the judge in each case to make a determination whether such efforts were required, and if required, whether they were made. The child’s health and safety are to be the paramount concern when determining what specific reasonable efforts are needed.

ASFA requires ‘reasonable efforts’ to be made at three stages:

1. to maintain children at home;
2. to reunite separated children with their family;
3. to arrange and finalise a new permanent home when reunification with the child’s family is not possible.

Reasonable efforts do not need to be made to maintain a child at home or to reunify a family if:

- a court has determined that the parent has subjected the child to aggravated circumstances, which include abandonment, torture, chronic abuse and sexual abuse;
- a parent is convicted of certain acts of murder, voluntary manslaughter or assault;
- the parent’s rights to another child have been terminated involuntarily.

Reasonable efforts should focus on the safety and well-being of the child while ensuring timely and appropriate attention is given to prevent her or his removal from home, to reunite a family or to find another permanent home for the child.

**Permanency hearings and hierarchy of permanency options**

Prior to ASFA, a dispositional hearing to review the child’s case was required to be held within 18 months of a child entering care and every 12 months thereafter, as long as the child remained in care. With the passage of ASFA, ‘permanency hearings’ were created to take the place of dispositional hearings.

If a legal determination is made that no reasonable efforts are required to reunify the family, then a permanency hearing must be held for a looked after child within 30 days. Otherwise the permanency hearing must be held no later than 12 months after the child has been placed in foster care, and at least every 12 months thereafter.

During the hearing, a hierarchy of options is considered in the development of the permanency plan. These options are:

- reuniting the child with his or her family;
- referring the child for termination of parental rights and placement for adoption, if the child cannot be reunited with his or her family;
- referring the child for the establishment of a legal guardianship, if adoption is not in the best interest of the child;
- placement with a fit and willing relative.

If none of these options is in the best interest of the child, ‘another planned permanent living arrangement’ can be the permanency plan for the child. There
must be a documented, compelling reason as to why none of the other permanency options are in the best interest of the child. Independent living services and long-term foster care are options that can be considered under the ‘other planned permanent living arrangement’ option.

At the permanency hearing the judge determines the appropriate permanency goal for the child, and whether satisfactory progress has been made towards achieving it. Changes in the permanency goal can be ordered when it is in the best interest of the child.

Termination of parental rights under ASFA
ASFA also put a limit on the amount of time that parents have to attempt reunification with their children. Unless one of three exceptions applies, a petition to terminate parental rights must be filed after the child has been in an out-of-home placement for 15 out of the most recent 22 months. This is a maximum time limit, not a minimum.

The exceptions to filing for parental rights termination in that timeframe are:

1. There are compelling reasons, documented in the agency file, why adoption is not in the best interest of the child.
2. Services necessary to reunify the child with his or her family were not provided.
3. The child is in a stable placement with a relative.

If the judge finds one of the three exceptions to apply, then severance of parental rights need not be sought.

Under ASFA, severance of parental rights has been sped up, with the goal of finding a new permanent home for children who cannot return to their family and to avoid a child languishing in care for an indeterminate amount of time.

Legal guardianship under ASFA
‘Legal guardianship’ is a new form of permanency arrangement not seen before in any previous US legislation on looked after children. A legal guardianship permits the child’s ties to his or her biological family to remain intact yet creates a more permanent and stable arrangement, with more legal protections than long-term foster care. The concept of ‘legal guardianship’ is defined in ASFA as:

*a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person and decision-making.* (Public Law 105-89 §101(6))

The legal guardian assumes the day-to-day responsibility and decision-making for the child.

ASFA allows each state to precisely define the legal guardianship arrangement. Each state is also left to decide whether to pay any subsidy or other financial assistance to a legal guardian. No direct federal subsidy is available for a legal guardianship, as occurs for foster care and some adoption arrangements.

States have taken varied approaches in providing subsidy in legal guardianship arrangements, with some drawing on more general sources of federal finance. Three approaches have been identified (Cornerstone Consulting Group, 2001):

1. the use of federal money for demonstration projects on providing legal guardianship subsidy;
2. funding of guardianship subsidy by the use of federal block grant monies to the state through the ‘Temporary Assistance for Needy Families’ funding. States have discretion in how to use the block grant funds in children and family services programmes;
3. states themselves provide funds for the guardianship subsidy.

The US Department of Health and Human Services approved seven states for five-year demonstration projects on subsidised guardianship. These projects paid a guardianship subsidy with federal money that is otherwise prohibited for that use. For instance, some states restrict
the subsidy to older children and others require that the child live with relatives. The amount of the subsidy also varies by state. Some provide an amount equal to the federal foster care or adoption subsidy, while elsewhere, the guardianship subsidy is less than the federal foster care or adoption payment.

Financial bonuses to states with increased adoptions
One of the key goals of Adoption 2002 and ASFA was to increase the number of children who were adopted from the child welfare system. To this end, a system of financial bonuses was created to encourage states to increase adoptions. Bonuses are paid to states that have increased adoptions for looked after children compared to the previous year. The bonuses are up to $4,000 per child and $6,000 per child with special needs (US Department of Health and Human Services, 1999). Nearly 50,000 children were adopted in the federal fiscal year 2000, which is an increase from 28,000 children adopted in federal fiscal year 1996 (US Department of Health and Human Services, 2001). At the time of writing, statistics for adoptions completed for federal fiscal year 2002 were not available.

Overview of initiatives in the UK
Adoption – A new approach
The White Paper, issued by British Prime Minister Tony Blair in December 2000, sets out the UK’s new approach to adoption (Department of Health, 2000). Much like Adoption 2002, Adoption – A new approach proposes new legislation encouraging the adoption of looked after children, including new standards and timescales for accomplishing adoptions, and emphasising that the welfare of the child is paramount in making adoption decisions.

The White Paper proposes that the government spends £66.5 million ($86.5) over three years to secure sustained improvements in adoption services, and sets a target of increasing by 40 per cent the number of children in care to be adopted by 2004–05.

Adoption – A new approach proposes legislation that will provide new options for permanency, establish a national adoption register and set new timescales for achieving adoption for children and for consultation on National Adoption Standards for England. It indicates that while child safety must be the overriding priority, the need to find safe, permanent families for children is an intrinsic, long-term element of giving children a safe, fresh start and a new opportunity.

The White Paper describes the limited existing legal options available for permanency for children. When reunion with the birth family is not a safe option, only adoption offers legal permanence but it requires the absolute severance of legal ties with birth families.

Included is a proposal for legislation that will create a new option for permanency called ‘special guardianship’. Similar to ‘legal guardianship’ in the USA, this provides an option for an intermediate form of permanency for children for whom neither adoption nor reunification with their family is appropriate.

The White Paper also sets out timescales for making permanency decisions for children in care. After a child has been looked after for six consecutive months, a permanency plan is to be made. Within six months of the decision that adoption is in the best interest of the child, the child should be matched with a prospective adoptive resource.

At the same time that the White Paper was released, National Standards for Adoption for England were issued for consultation.

National Standards for Adoption
A draft of the National Standards for Adoption for England was published with the White Paper in December 2000. In August 2001, the final version was released (Department of Health, 2001c). The Standards aim to provide a clear framework for everyone involved in the adoption process. This includes the child, the birth parents, the adoptive parents and the professionals. The Standards focus on meeting the needs of children and include demanding targets for reducing the amount of time that children wait for adoption.

The National Adoption Standards for
England came fully into force on 1 April 2003. The Standards apply only in England, not throughout the UK. Key components include:

- that the child’s welfare, safety and needs are at the heart of the adoption process;
- development of timescales for permanency planning and adoption.

Child’s welfare, safety and needs One of the key principles of the National Adoption Standards is that the needs and wishes, welfare and safety of the child be at the centre of the adoption process. The Standards require that every child will have his or her wishes and feelings listened to, recorded and taken into account. Where the child’s wishes are not acted upon, the reasons for not doing so are to be recorded and explained to the child.

Each child is to have a named social worker who is responsible for that child throughout the adoption process. Children are to be given a clear explanation and information about adoption, covering what will happen at each stage of the case, including court appearances, and to be told how long each stage is likely to take in their individual case.

The child’s needs, wishes and feelings, welfare and safety are to be the most important concerns when considering whether an adopted child should have contact with birth parents and wider birth family members. All adoption plans are to include details of the arrangements for maintaining links, including contact with birth parents, wider family members and other people who are significant to the child.

Eighty-two young people were consulted about the Standards. They identified three key areas that they considered necessary to ensure that the children’s needs were kept at the centre of the adoption process. These were:

1. timescales which avoid unnecessary delay, but take into account the needs of the individual child;
2. listening and responding to children’s views;
3. consistent post-adoption support.

Development of timescales The National Adoption Standards call for a permanency plan to be developed at the four-month review of a child’s case. This is a shorter timeframe than the six months proposed in the White Paper. The National Standards also require that clear timescales be set for achieving the plan for permanence, and that the plan be appropriately monitored and considered at every subsequent review. When a child’s permanency plan is adoption, a match with suitable adoptive parents is to be made within six months of the agency agreeing that adoption is in the child’s best interest. This is consistent with the timescale set up by the White Paper, thus accomplishing the goal that when adoption is the permanency plan, a child should wait no more than a year from entering care to being matched with an adoptive family.

Increasing the number of adoptions On 21 December 2001, the UK Minister of State for Health announced a new target focusing on increasing the number of adoptions for children. This new target is that by 31 March 2005, at least 95 per cent of children will be placed for adoption within 12 months of the decision that adoption is in the best interest of the child – an increase from 81 per cent of children in 2001 who were placed for adoption within 12 months (Department of Health, 2001b).

Adoption and Children Act The Adoption and Children Act was formally enacted and received Royal Assent on 7 November 2002 (www.Parliament.the-stationery-office.co.uk). The main provisions of the Act will come into effect in 2004, with other parts of the Act coming into effect in April 2003 (Department of Health, 2001b). It applies to England and Wales.

Special guardianship A key feature of the Adoption and Children Act is ‘special guardianship’, as proposed in the White Paper. A court order may be made to appoint one or more individuals over the
age of 18 to be the special guardian of a child. Special guardianship provides permanency for a child for whom neither a return home to parents nor adoption is appropriate. It provides a middle ground between long-term foster care and adoption. Prior to court approval of the special guardian, the local authority must submit a report to the court which details the suitability of the applicant to be approved as a special guardian.

While the special guardianship order remains in place, the special guardian has parental responsibility for the child and is entitled to exercise that responsibility to the exclusion of any other person who has parental responsibility for the child. At the request of a child’s special guardian, the local authority must carry out a needs assessment and determine whether to provide any special guardian support services. These services can include counselling, advice, information and financial support.

The Government will develop regulations about providing the assessments, preparing and reviewing a plan for special guardianship support services, and reviewing the provision of such services.

Implications of adoption initiatives
The adoption initiatives undertaken by the USA and the UK have many features in common:

- new legislation reforming adoption laws have been passed;
- the enacted legislation stresses that the safety and well-being of the child is the paramount or central concern in making adoption decisions;
- there are goals to significantly increase the number of looked after children who are adopted;
- a new permanency option has been created which is somewhere between long-term foster care and adoption. It provides the stability of an adoptive arrangement without the severance of legal ties to the child’s birth family;
- timescales for developing a permanency plan for a child have been established.

Features that are different include:

- Whether a subsidy is available for ‘legal’ or ‘special guardianship’ – in the UK a subsidy is available for special guardianship, but in the USA it is left to each state to determine whether a subsidy is available.
- In the UK, ongoing support services can be accessed from the local authority upon the request of the special guardian. In the USA there is no provision for such support for the legal guardian.
- There are differences in the use of long-term foster care. In the USA, long-term foster care can be used only in limited, compelling circumstances. In the UK, it is available as a permanency option, without the restrictions on its use as seen in the USA.
- While both the USA and the UK have established timescales, these differ in detail. The USA has set timescales to decrease the amount of time a child spends in care before parental rights are terminated, but has no timescales to achieve adoption following the termination of parental rights. The UK has set timescales to shorten the amount of time a child waits for adoption once adoption has been established as the goal, but has set no timescales on when adoption should be established as the permanency goal. The White Paper proposes that a match with an adoptive family should be achieved within one year of entering care when adoption is the permanency plan, assisted by the permanency plan at four months. An adoptive family match should occur within six months of establishing adoption as the plan for the child.

Understanding the impacts of choices on children
It is vital to understand the various subjective impacts of these permanency choices for children. The overarching message in the USA and the UK initiatives is for quicker and increased adoptions of looked after children. Targets, new timescales, changes to legal procedures and even financial incentives are utilised as part of the package to meet the goal of achieving these adoptions.
Does the prioritising of adoption work to the detriment of children for whom adoption is not an option? Lowe and Murch and colleagues (2002), in their research, note the obvious danger of concentrating too much energy and resources on adoption to the detriment of other children, in particular to the detriment of older children for whom adoption is much less likely to be an option.

Will there be a sufficient number of adoptive homes for the children awaiting adoption? Recent findings released from the British Association for Adoption and Fostering (BAAF) indicate that in the UK there are not enough adopters coming forward for children currently waiting to be adopted (BAAF, 2002). Similarly, despite the efforts of ASFA, there continue to be large numbers of children awaiting adoption in the USA. It may be easier to sever parental rights than to create new permanent homes (Selwyn et al., 2002).

As for those children who are adopted, there is no requirement for reports and studies which track whether children are being adopted by homes which are appropriate and stable enough to provide permanence. Simply measuring adoption disruption rates does not provide adequate information.

While the UK is undertaking a study on the disruption rate of adoptions of looked after children (Department of Health, 2001b), it will not report on the causes of disruption, nor perhaps more importantly, which factors are key to the success of an adoption placement. Until January 2002, US law did not require reports on outcomes from child welfare, although it demanded tracking and reporting of the adoption dissolution numbers for children who enter the United States through international adoption arrangements (Public Law 106-279, §104 (b) (3)), including whether the child subsequently enters the public child welfare system. Under a law passed in January 2002, the Secretary of the US Department of Health and Human Services now must report to Congress on the outcomes of adoptions that were finalised after the enactment of ASFA. These reports must be made every two years, with the first one to be made in April 2003 (PL 107–33).

Understanding the impact of these adoption initiatives requires a careful examination of the experiences of the children who have been adopted as a result of them. Permanency begins with the adoption, but it does not end there. Challenges to achieving permanency do not end with the legalisation of an adoption. As a result of these initiatives, children once thought to be unadoptable will be placed in adoptive homes. Inevitably some adoptions will disrupt, no matter what services are available. What will be done to provide for children whose adoption has disrupted? What post-adoption services contribute to the stability of an adoption? The funding and availability of post-adoption and post-guardianship services, and matching with resources, will be critical to the success of these arrangements (Selwyn and Sturgess, 2002).

It is likewise important to understand whether special guardianship and legal guardianship live up to their promise as an intermediate form of permanency. What are the long-term impacts on the children who are placed in these arrangements? How important is it to the success of this arrangement that a subsidy and support services are available?

Long-term foster care, now only to be used in limited and compelling circumstances in the USA, can be a permanency option for children in the UK without the restrictions found in the USA. Long-term foster care needs to be examined and understood as the best vehicle in some circumstances to provide a safe and stable family for a child. What factors make long-term foster care a successful choice? When does it succeed in providing a sense of stability for a child? When is it preferable to pursue long-term foster care rather than a special or legal guardianship or adoption?

Research indicates that the use of the term ‘long-term fostering’ is imprecise, that it is hard to find positive policies for its use, and that it is often seen as a residual option where no other one is available. Lowe and Murch’s study points
to the need for policy and planning for long-term foster care to be sharpened up, with clear answers to what it is and positive reasons for its use (Lowe and Murch *et al.*, 2002).

The conditions that initiated the *Adoption 2002* effort and the White Paper still exist, although perhaps in lesser degrees. While focus is on achieving permanent homes for looked after children who cannot return home, there is a risk of losing sight of an individual child when also trying to meet targets and timescales. With the changes brought on by these initiatives, it is more important than ever to understand the impact of these changes on children, and the factors that contribute to the success or failure of these in providing a permanent home for a child.

**References**

Adoption and Children Act, 2002, UK

Adoption and Safe Families Act, Public Law 105-89

Adoption Assistance and Child Welfare Act, Public Law 96-272

British Association for Adoption and Fostering (BAAF), Press release, 4 November 2002


Department of Health, Local Authority Circular, 21 December, 2001a

Department of Health, Local Authority Circular, LAC (2001) 33, 2001b


Intercountry Adoption Act of 2000, Public Law 106-279


Promoting Safe and Stable Families Act, Amendments of 2001, Public Law 107-33


US Department of Health and Human Services, Press release, 24 September 1999

US Department of Health and Human Services, Press release, 10 September 2001

www.Parliament.the-stationery-office.co.uk

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